NOTES

In re Uncertainty: A Uniform and Confidential Treatment of Evidentiary and Advocatory Materials Used in Mediation

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I. INTRODUCTION

Imagine getting a call from one of your largest clients who needs a dispute to disappear quickly and quietly. Litigation is not an option because it creates public records. The client does not trust the opposing party, so he is leery about private settlement negotiations. Knowing its many benefits, you recommend mediation. After discussing the advantages of mediation, and particularly the confidential nature of the process, your client agrees to participate. Everything runs smoothly until the mediator requests that both sides prepare and submit briefs prior to the mediation session. Your client was willing to talk with the mediator and other party about the dispute, but putting his story in writing is a different story. Before he is willing to comply with the request, your client wants your assurance that the brief will be absolutely protected from future disclosure.

After conducting some initial research regarding the confidentiality of materials prepared for mediation, you are surprised by the inconsistent and often nonexistent law governing the topic. There is no universal approach to dealing with these questions, and you cannot be certain how to advise your client. If he permits you to draft a brief and the parties reach a confidential settlement, the client will be ecstatic. However, if the content of the brief is ever made public, it will devastate your client, and in turn your legal practice. What do you do?

Although the preceding example may be extreme, it reflects the current status of the law governing materials prepared for mediation, and illustrates the difficult decisions that many parties must make when preparing for mediation.

When participating in a mediation, attorneys, parties, and mediators expect an atmosphere of cooperation, with an open and honest exchange of information. This exchange is what ultimately leads to the successful

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resolution of many mediated disputes. Without this confidentiality, parties may be less willing to speak freely throughout the mediation process and more guarded with the information and evidence they choose to disclose. The parties might even choose to forego the benefits of mediation and take a claim to litigation. The same is true of materials prepared for and used in the course of a mediation.

Recognizing the threat created by a lack of open communication during settlement, confidentiality of mediation proceedings and the information disclosed in them has been studied, written about, and legislated with painstaking detail.[1] The federal government and virtually every state has adopted statutes governing mediation confidentiality,[2] and the judicial precedent regarding mediation confidentiality is staggering.[3] While the benefits of mediation privileges are generally accepted, particularly in light of the creation of the Uniform Mediation Act (UMA),[4] the same protection has not been afforded to evidence and other materials prepared for and used in mediation. There is little judicial precedent and even less codified law governing evidentiary materials prepared specifically for and used in mediation.[5] This leaves a tremendous gap in the protections afforded to individuals who look to mediation as a dispute resolution process. These

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[1] *See generally* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney—Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 755–57 (1997) (providing a detailed chart of all state mediation confidentiality statutes enacted before 1997).

[2] *See generally id.* (describing the numerous statutes dealing with mediation confidentiality).

[3] *Id.* at 723 (commenting on judicial precedent that acknowledges the importance of confidentiality in mediation); *id.* at 733 (noting the varying degrees of confidentiality and lack of uniformity afforded by these state programs).

[4] *See* UNIFORM MEDIATION ACT (Final Act, Feb. 4, 2002), *available at* http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm (last visited Feb. 14, 2005) [hereinafter UMA]. The UMA was drafted as a model statute for states to enact in order to ensure the confidentiality of mediation communications. It was a cooperative effort between the American Bar Association Section on Dispute Resolution and the National Conference of Commissioners of Uniform State Laws.

[5] Few courts have had the opportunity to consider the issue of confidentiality as applied to evidence used in mediation. Courts that have addressed the issue reached varied conclusions. *See, e.g.*, Rojas v. Los Angeles County Superior Court, 93 P.3d 260, 265 (Cal. 2004) (holding that raw evidence used in a mediation was not privileged); *see also* Bidwell v. Bidwell, 21 P.3d 161, 164–65 (Or. Ct. App. 2001) (applying a mediation privilege to letters between parties during the mediation, but not to letters after the mediation had concluded).

individuals are not afforded the assurances of confidentiality that are essential to the parties' effective preparation and eventual mediation of their disputes.[6]

Individuals choose to participate in mediation rather than litigation or other forms of alternate dispute resolution (ADR) because of the substantial benefits it affords. Cost effectiveness, prompt resolution of disputes, and mutually beneficial outcomes encourage individuals to participate in all forms of ADR, but the confidentiality that surrounds mediation procedures separates it from other techniques.[7] Mediation provides security to individuals who do not want to air their dirty laundry, or who have an interest in protecting information from public disclosure.[8] The current guarantees of confidentiality conferred on mediation participants, however, are incomplete.[9] Existing protection will not be sufficient until legislatures and courts adopt a uniform approach to the treatment of evidence and other advocatory materials that are prepared solely for use in mediation.

This Note encourages a two-fold approach to dealing with confidentiality of evidentiary materials used in mediation. First, it encourages the adoption of §§ 4–6 of the UMA[10] by federal and state governments.[11] The second

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[6] *See, e.g.*, RDM Sports Group, Inc. v. Equitex, 277 B.R. 415, 437 (Bankr. N.D. Ga. 2002) (discussing inconsistent federal holdings in regards to confidentiality of materials prepared for and used as evidence in mediation, and acknowledging the need for a federal privilege applying to these materials).

[7] Kentra, *supra* note 1, at 722. "[M]ediation ensures confidentiality, which is one of the most attractive and powerful attributes of the mediation process." *Id.*

[8] *Id.* at 722. Mediation also affords a higher degree of confidentiality than negotiation or arbitration when protected by a privilege. It is not limited to the scope of Federal Rule of Civil Procedure 408, which limits the admissibility of settlement negotiations in trial. Rather, a privilege prevents the contents of mediation from being obtained in discovery.

[9] *See* Ellen E. Deason, *Reply: The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 84–85 (2001) (noting that without providing a uniform approach to confidentiality, parties cannot be assured that their communications and the evidence used in a mediation will be privileged). "The positive influence of confidentiality is lost if, during the mediation, the parties and their lawyers do not have confidence in their ability to protect communications from future disclosure and in the system's protection for mediator and judicial neutrality." *Id.* at 84–85.

[10] UMA, *supra* note 4, §§ 4–6. Sections 4–6 of the UMA create a uniform mediation privilege to be applied by courts in order to exclude mediation communications from discovery and admissibility in later court proceedings.

[11] At the time this Note was written, the UMA has been introduced into at least eight state legislature, including: Indiana, Maine, Massachusetts, New York, and Vermont. *See*

purpose is to suggest uniform factors for courts to consider when determining the confidentiality of evidence and other advocatory materials that are not governed by the UMA.[12] Part II will discuss the policy rationale for protecting the confidentiality of mediations and materials prepared for mediation. Part III addresses the use of evidence and other advocatory materials prepared for mediation and the vastly different treatment of these materials by federal and state governments and courts. Finally, Part IV urges uniform treatment of these materials, encourages federal and state governments to adopt the UMA, and suggests appropriate criteria for courts to use in determining whether confidentiality should apply to these materials.

II. MEDIATION AND CONFIDENTIALITY

A. *The Essential Nature of Mediation Privileges*

Mediation is an important tool used to reduce the burden of litigation on limited court resources.[13] It is also beneficial to parties seeking an opportunity for less costly and more efficient dispute resolution.[14] Understanding the importance of mediation, lawmakers and courts also acknowledge the necessity of protecting the content of mediation proceedings as confidential.[15] Particularly in light of the voluntary nature of mediation,[16] confidentiality has become an important tool to encourage

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Mark Hansen, *Uniform Act Protects Statements*, A.B.A. J., June 2003, at 61. It died in committee in New Hampshire. The UMA was enacted in Nebraska and Illinois. *Id.* The UMA is also currently under debate in the Ohio Legislature as House Bill 303. In introducing the bill, sponsor Rep. Oelslager stressed its importance in "foster[ing] good mediation practice with fundamentals including confidentiality, privilege, expanded and continuing requirements for disclosure of conflicts of interest, 'voluntariness' of settlement and the basic right of informed self-determination of the parties." E-mail from Nancy H. Rogers, Dean, The Ohio State University Michael E. Moritz College of Law (Feb. 17, 2004, 19:22:00 EST) (on file with author).

[12] UMA, *supra* note 4, §§ 4–6.

[13] *See* Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45, 45 (1998) (noting the increased popularity of ADR, particularly mediation, because of its ability to reduce the burden on crowded court dockets).

[14] Mark Hansen, *Selling Your Case a Different Way*, A.B.A. J., June 2003, at 59.

[15] *See* Kentra, *supra* note 1, at 722 ("Confidentiality lies at the heart of the mediation process. Mediation would not be nearly as effective if the parties were not assured their discussions would remain private.").

[16] Even if participation in the mediation process is mandated, the actual settlement of a dispute is at the voluntary discretion of the parties involved. Mediators "assist

parties to participate in this dispute resolution process.[17] Without such protection, individuals would be much less willing to exchange information and materials throughout the mediation process.[18] This would render the procedure essentially useless, because a candid exchange of information is essential to a mediation's effectiveness.[19]

> If participants cannot rely on the confidential treatment of everything that transpires during [mediation] then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.[20]

The degree of trust inherent in a confidential mediation helps the mediator serve as a catalyst for the disclosure of valuable information and enhances his or her ability to aid in the settlement of the dispute.[21] Without a guarantee of confidentiality, this trust would be destroyed.[22]

Despite its widespread acceptance in the field, mediation privilege and other forms of ensuring confidentiality of mediated communications and materials have their critics. A number of scholars are concerned that private dispute settlement deprives courts of deciding public matters, and therefore society is deprived of a substantial amount of judicial precedent.[23] The concern is that mediation's focus on reconciliation and repairing individual

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disputing parties in voluntarily reaching their own mutually acceptable agreement." *Id.* at 718 (internal citations omitted).

[17] *Id.* at 722–24.

[18] *Id.* at 722 ("Parties would be hesitant to bare their souls to someone who may be called as a witness against them in subsequent litigation.").

[19] *See generally* Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1074 (Cal. Ct. App. 2002) (holding that the purpose of a mediation privilege is to encourage confidentiality of not only mediation communication, but of documents introduced in the mediation process that showed a party's thought processes or evaluated their case). The Court also acknowledges that, because of the possible harm caused by disclosure of information in a later adjudication, the frank exchange necessary to a successful mediation would be hindered if parties were not afforded confidentiality. *Id.*

[20] *See* Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (discussing the "imperative need for confidence and trust" in the mediation context).

[21] Kentra, *supra* note 1, at 722–23.

[22] *Id.* at 722–23.

[23] Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

relationships may result in public ignorance about important legal issues.[24] Mediation, and privileging the communications and materials used during the process, however, does not create a public hardship. The use of ADR increases the public participation in dispute resolution because the settlement process provides for greater involvement by the disputants.[25] Furthermore, any information or judicial precedent that is lost because of the confidentiality of private dispute resolution is outweighed by the benefits that the mediation process affords to the parties involved in the dispute.[26] Acknowledging a mediation privilege causes very little public detriment.[27] When this minor detriment is weighed against the substantial benefits that correspond with instituting a privilege, the latter should prevail.

Acknowledging the importance of mediation and ensuring that its contents remain confidential, the federal government and most states have adopted statutes to protect its confidential nature.[28] These statutes, as well as judicial precedent, protect the communication and interaction between the parties in the mediated setting, and often preclude testimony by the third-party mediator in a later judicial proceeding.[29] The statutes provide a degree of stability to discussions that occur in a mediation. However, they only establish a portion of the protection needed to provide an adequate guarantee of confidentiality to individuals participating in mediation. Protecting evidence and other materials prepared for and used during mediation is an essential component of the privilege that has been virtually ignored.

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[24] Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 678–679 (1986).

[25] Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, U. CHI. LEGAL F. 303, 316–17 (1990).

[26] *See* Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, 1172 (C.D. Cal. 1998).

[27] *See id.* at 1178. "[T]here is very little *evidentiary* benefit to be gained by refusing to recognize a mediation privilege." *Id.* (noting that evidence disclosed in mediation that is otherwise discoverable would remain so even with the adoption of a mediation privilege, and that evidence which is not otherwise discoverable would not exist but for the mediation). Accordingly, there is no harm in providing a privilege for these materials. *Id.*

[28] Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511, 514 (W.D. Pa. 2000) (noting that 49 states and the District of Columbia have adopted mediation confidentiality statutes).

[29] *Id.*

B. *Materials and Evidence Used in Mediation Must Also Be Privileged*

Ensuring the confidential treatment of materials prepared for mediation and submitted to the mediator and/or the opposing party during a mediation is as important as protecting the actual discussion that occurs during the proceedings. Parties to a mediation have the same need to protect the materials they prepare for the mediation as they do for the actual communication that takes place. Without this protection, parties will likely be less than eager to file mediation briefs and other materials necessary to get the mediator up to speed on the dispute. Moreover, individuals may lose the benefit of advocatory materials and demonstrative aids for fear that such materials would later be used to their detriment. The current structure of mediation privileges, however, does little to advance this concern. In providing for mediation confidentiality, most state statutes fail to specifically provide for the confidentiality of evidence and other materials prepared for and used in the course of mediation, burdening courts with this issue.[30] This leads to a lack of uniformity and to a substantial degree of uncertainty for parties involved in mediation.[31] This uncertainty is furthered by the vague and inconsistent definitions contained in the applicable statutes.[32] Considering these factors, there is little guidance as to whether or not materials prepared for and utilized as evidence during mediation will be deemed confidential. This leaves the parties to deal with the peril of these uncertainties.

To eliminate this substantial uncertainty, legislatures must adopt a uniform mediation privilege that specifically addresses evidence and other materials used in mediation. To do this, however, two types of materials must be protected. First, the mediation privilege must apply to written materials

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[30] *See, e.g.*, COLO. REV. STAT § 13-22-307(2) (2003); *see also* CAL. EVID. CODE § 1119 (C) (Deering 2003); OHIO REV. CODE ANN. § 2317.023 (A)(2) and (B) (Anderson 2001); OR. REV. STAT. § 36.110(7) (1994); WYO. STAT. ANN. § 1-43-102 (Michie 2003).

[31] *Cf.* Kentra, *supra* note 1, at 724–25 (noting the burden of uncertainty caused by the many different approaches that states have adopted to protect the confidential nature of mediation communications).

[32] *See, e.g.*, OHIO REV. CODE ANN. § 2317.023 (A)(2). Ohio law provides: "Mediation Communication means a communication made in the course of and relating to the subject matter of a mediation." *Id.* This definition describes the protected communications in general terms and provides no specific guidance as to whether communications can be written, whom the communications can involve, or the time frame during which they may take place. The court will be left with the burden of deciding whether documents prepared for mediation, such as mediation briefs, are included in this general definition of a mediation communication.

prepared for mediation that may or may not be considered a communication, depending on the interpretation of applicable statutes.[33] Second, evidence used in mediation that evaluates one party's case and is prepared solely for this purpose should be governed by a mediation privilege.[34]

The first category that must be protected is written documents prepared solely for the mediation that are used to advocate for one's case. Such materials include mediation briefs, reports, letters, and memoranda between parties or from one party to the mediator regarding the mediation or advocating one's position in the mediation.[35] The requirements for submitting these materials differ depending on the state and jurisdiction.[36] Some court-mandated mediation programs require parties to provide mediators with an evaluation of their case a certain number of days before the mediation occurs.[37] Other mediation programs do not require such preparations but accept them in order to expedite the mediation process.[38] Still other programs do not accept such materials or accept them at the discretion of the mediator.[39] Regardless of whether mediation briefs or statements are mandatory or permissive, statutes and courts must provide for their confidentiality. Parties who are not guaranteed such protection will be concerned that the evaluative statements contained in these materials could be used as evidence against them by the opposing party or by individuals who may file suit at a later date.[40] Parties would be dissuaded from

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[33] Many statutes recognize confidentiality of mediation communications, however they differ in definition and scope of protection. *See, e.g.*, CAL. EVID. CODE § 1119; OHIO REV. CODE ANN. § 2317.023 (B); OR. REV. STAT. § 36.220(1)(a).

[34] Hansen, *supra* note 14, at 59–60 (acknowledging the importance of evidence and advocacy in mediation).

[35] Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV. 1259, 1326–27 (1995) (discussing the use of preparatory briefs in Bankruptcy mediation).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] For example, the Night Prosecutor Mediation Program in Columbus, Ohio, does not provide mediators with any information about the case to be mediated. "[W]hen the mediator knows a lot about the situation, he or she tends to formulate an approach to treating that ONE issue before entering the room. This can result in the possible exclusion of all other problems. This is analogous to a doctor only treating symptoms, never discovering the underlying disease." E-mail from Richard J. Ortiz, Coordinator, Night Prosecutor Mediation Program, Columbus City Prosecutor's Office (Nov. 8, 2004, 17:38:00 EST) (on file with author).

[40] *See, e.g.*, Kentra, *supra* note 1, at 722.

submitting any evaluation of their case, and, if required, those received would be much less critical and would serve as a method through which to present only information that is favorable to their side.[41] This hinders the free flow of information inherent in mediation and must be prevented.

The second important group of materials that must be privileged is evaluative evidence used during a mediation to advocate for a party or provide information to other parties and the mediator. This category includes both evidence exchanged between parties during the mediation[42] and materials that are distributed to the mediator with the expectation that they will remain confidential.[43]

In mediation, advocates must determine what to share with the other side, what to share with the mediator, and what not to share at all. This determination includes not only what to say, but how to present information effectively, and what evidence could lead to a more beneficial settlement.[44] Advocacy and persuasion are nearly as important to mediation as is the open communication and disclosure that is protected by current mediation privileges.[45] Because it is so important, this type of evidence that includes an evaluation of the dispute or reveals a party's thought processes should be governed by confidentiality provisions. This is the only way to encourage the use of such materials in order to reach effective and efficient settlement agreements. Without this type of guarantee, parties would be hesitant to use any evidence that could hinder them at trial or that might be made public. Moreover, parties would be forced to conceal any evaluation or mental processes shown by their evidence, which would eliminate many of the efficiencies gained in the mediation process. Once again, the lack of

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[41] *Id.* at 722.

[42] It is important to recognize that not all evidence can be protected by a mediation privilege. Materials that would be otherwise discoverable will remain discoverable despite their use in mediation. *See, e.g.*, FED. R. CIV. P. 26 (general provisions governing the discoverability of evidence). However, materials that are disclosed to opposing parties during mediation that are not discoverable should be privileged.

[43] Protecting materials used during a mediation caucus is of significant importance, because parties often disclose information to the mediator in these private sessions that they would not share with their opponents. If evidence shared with the mediator was subject to discovery and admissibility in future litigations, parties would be leery of not only the other side, but the mediator as well. *See generally* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 3:2 (2d ed. 2001) (discussing the caucus, its role in mediation, and ethical problems that may arise from caucuses).

[44] Hansen, *supra* note 14, at 63.

[45] *Id.* at 60 (discussing the cooperative advocacy that must take place in order for a mediation to be successful).

protection for evidence used in mediation is at the expense of the mediation process. Confidentiality of this type of evidence used in mediation must be guaranteed in order to ensure that mediation is an expedited, cost-effective, and successful dispute resolution technique.

III. THE UNCERTAIN STRUCTURE OF PRIVILEGE FOR EVIDENCE AND MATERIALS PREPARED FOR MEDIATION

A. *State Judicial and Legislative Actions Do not Sufficiently Protect Confidentiality of Materials or Evidence Used in Mediation*

Current approaches to protecting the confidentiality of materials prepared for mediation vary greatly among states.[46] At a minimum, this provides a degree of uncertainty for mediation participants.[47] At most, it eliminates one of the substantial benefits of this form of ADR and dissuades individuals from utilizing mediation processes.[48] A survey of existing state confidentiality provisions regarding both written materials and evidence used in mediation will illustrate the similarities and the vast discrepancies in how these materials are treated, and will demonstrate the failure of many statutes to specifically comment on this matter.

1. *Mediation Communications and the Uncertain Protection Afforded to Materials Prepared for Mediation*

In order to inform a mediator, to provide a sound basis of one's case to the other party, or to advocate a position, parties often prepare briefs and other reports prior to participating in a mediation.[49] These documents include not only facts and opinions about the dispute in question, but often times they include an evaluation of the strengths and weakness of a party's case.[50] It is equally, if not more, important to protect materials and writings prepared in

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[46] *See* Deason, *supra* note 9, at 79 (explaining that "[t]here certainly is little consistency, foolish or otherwise, in the current laws, rules and judicial practices that govern confidentiality in mediation. Experimentation by the states has led to a rich, but conflicting, variety of approaches.").

[47] *See id.* (noting the need to "advance predictability through a coordinated approach to confidentiality").

[48] *See id.*

[49] Mabey et al., *supra* note 35, at 1281.

[50] *Id.*

contemplation of mediation as it is to guarantee the confidentiality of statements and admissions made during the course of a mediation.[51] The current treatment of these materials, however, is not the same as the protection afforded to conversations and admissions made during a mediation.[52] Rather, the degree of confidentiality afforded to these documents by state courts and legislatures is uncertain and speculative to say the least.[53]

Whether or not written documents and evidentiary materials are privileged depends largely upon a state's confidentiality provisions relating to mediation communications. Unfortunately, many states provide vague and uncertain definitions of mediation communications.[54] Even if the definition appears to be solid on its face, many do not explicitly state precisely which materials are protected.[55] Existing definitions leave courts with little guidance with which to decide whether materials prepared for mediation are indeed privileged.[56] These statutes also afford courts too much discretion in making such a determination.

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[51] *See, e.g.*, CAL. EVID. CODE § 1119 (Deering 2003) (privileging not only mediation communications, but also written materials made in contemplation of mediation). A number of states attempt to provide similar privileges, illustrating the importance of protecting written materials submitted during mediation. However, because the privileges vary significantly in scope and in the actual protection they afford, there is no uniformity, and little certainty that the protection will actually apply.

[52] Despite the recognition by a number of states of the importance of protecting written materials prepared for mediation, most states fall short of the necessary statutory provisions to adequately protect them. The overly broad and vague statutes adopted by a number of states leave substantial leeway for judicial interpretation, and thus provide no uniform or predictable privilege of these materials.

[53] The uncertain nature of the privilege will prevent many parties from disclosing information that they do not want to appear in a later judicial proceeding. Uniformity and certainty are essential in order to promote the candor and honesty necessary in a successful mediation. *See* Deason, *supra* note 9, at 84–86.

[54] *See, e.g.*, COLO. REV. STAT. § 13-22-307(2) (2003); *see also* OHIO REV. CODE ANN. § 2317.023 (Anderson 2001); WYO. STAT. ANN. § 1-43-102 (Michie 2003). The privileges in these states do not provide a time frame with which materials must be submitted in order to be privileged, nor do they explicitly state what is covered by the confidentiality provision.

[55] *See, e.g.*, CAL. EVID. CODE § 1119; *see also* OR. REV. STAT. § 36.110(8) (2003). Each statute appears to provide a concrete definition of what is confidential; however, the courts have found both vague enough to require substantial interpretation.

[56] *See generally* Bidwell v. Bidwell, 21 P.3d 161, 163–65 (Or. Ct. App. 2001); *see also* Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1072–79 (Cal. Ct. App. 2002). In both cases, the court was required to interpret vague confidentiality statutes. *Cf.* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1131 (N.D. Cal. 1999)

A survey of the privilege statutes from only a few states illustrates the many inadequacies that exist. For example, this Note will examine the statutes from Oregon, California, Colorado, Ohio, Wyoming, and Pennsylvania. These states were chosen either because there was judicial action pending with regard to the statute or to highlight the strengths and weaknesses of the existing privilege in each state.

Oregon's mediation privilege statute illustrates one important inadequacy with the current treatment of materials prepared for mediation. The statute appears to provide a detailed definition of mediation communications.[57] It adequately explains to which materials the statute applies. However, the statute fails to describe a time frame in which mediation communications take place.[58] In stating that a mediation communication is prepared for, or submitted in the course of or in connection with mediation,[59] the legislature provides little guidance for parties as to whether the privilege applies to materials exchanged before a mediation officially begins or after the formal session has concluded. This leaves parties at a significant disadvantage when planning their mediation strategies, because they cannot know how a court might decide this question.[60]

(illustrating the leeway taken by courts to inject factors not in a codified statute when interpreting mediation privileges). The Magistrate Judge weighed the need for confidentiality with the possible injustice of privileging mediation communications; the codified privilege, however, was categorical and did not call for such a balancing test. *Id.*

[57] Oregon's privilege statute states: "Mediation communications are confidential and may not be disclosed to any other person." OR. REV. STAT. § 36.220(1)(a). Mediation communications are defined to include "[a]ll memoranda, work products, documents, and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings." OR. REV. STAT. § 36.110(7)(b).

[58] *Id.*

[59] *Id.*

[60] In Oregon, this question was answered by the Court of Appeals' holding in *Bidwell*. In this case, a wife petitioned for attorney fees after her husband's appeal from a trial court's judgment. *Bidwell*, 21 P.3d at 162. She sought to introduce letters that had been sent by the husband during an attempted mediation. *Id.* The husband moved to strike the letters as confidential under the Oregon statute. *Id.* In determining whether the letters were mediation communications, the court questioned whether they had an independent significance apart from the mediation and the time frame in which they were sent. *Id.* at 164. Concluding that they had no significance other than to the mediation, the court held two letters sent during the mediation process confidential. *Id.* A letter written after formal mediation proceedings had concluded, however, was admissible. *Id.* at 165.

California's mediation privilege provides a substantially more detailed description of the materials that should be protected.[61] It is intended to protect all written communications, including those prepared for or in the course of mediation. However, it falls prey to the same criticism as the Oregon statute: It provides no explicit guidelines as to when the materials must be created or submitted.[62] The code may also be criticized for a failure to realistically define which writings are protected.[63] California defines a writing very broadly to include handwritings, printing, photographs, and recordings.[64] This broad definition may be subject to scrutiny and judicial interpretation that further limits the applicability of the mediation privilege.[65] Once again, parties are left guessing as to whether the materials they prepare for mediation qualify as protected communications and are covered by the code. Parties also have little guidance as to when they have to prepare or submit the materials to ensure that the privilege applies.

The definition of a mediation communication is the significant flaw with Colorado's mediation privilege. Colorado provides substantially less guidance as to whether or not materials prepared for and used during mediation are protected from disclosure.[66] The statute does not define

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[61] CAL. EVID. CODE § 1119 (Deering 2003). The Code provides:

> Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled . . . (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation, is admissible or subject to discovery . . . (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Id.

[62] *Id.*

[63] *Id.*

[64] CAL. EVID. CODE § 250.

[65] *See* Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1072–73 (Cal. Ct. App. 2002) (limiting the scope of the privilege to exclude raw evidence used in a mediation).

[66] COLO. REV. STAT § 13-22-307(2) (2003). Colorado's statute provides:

> Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization . . . .

Id.

mediation communication, it does not indicate whether these communications can be written or must be oral, and it does not provide any guidance as to whether communication can occur before or after a formal mediation proceeding. In Colorado, however, not only has the legislature failed to provide a clear understanding of what is covered by the term mediation confidentiality, but the courts have as well.[67] A recent holding by the Colorado Court of Appeals stressed the confidential nature of mediation communications at all stages of the mediation process, but it does not provide an applicable test with which to determine what is privileged.[68] Once again, individuals seeking to mediate their disputes are left to weigh the benefit of providing mediators and other parties with materials prepared for mediation against the possible cost of their discoverability at a later date.

The same flaw applies to the Ohio and Wyoming mediation statutes. Ohio's and Wyoming's laws governing mediation communications are significantly more vague than the Oregon and California statutes. The Ohio Revised Code defines a mediation communication as "a communication made in the course of and relating to the subject matter of a mediation."[69] Wyoming's statutes provides little more detail, stating that "[a]ny communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the mediation process or those reasonably necessary for the transmission of the communication."[70] These laws do not provide individuals participating in mediation with the requisite certainty as to whether materials they prepare for mediation will be protected. The statutes provide no guidance as to what form the communication must take or whether it can occur before or after formal mediation proceedings.[71] Parties to mediation in Ohio and Wyoming

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[67] Nat'l Union Fire Ins. Co. v. Price, 78 P.3d 1138 (Colo. Ct. App. 2003). This was an appeal from the trial court's judgment enforcing an oral agreement to settle that was allegedly reached in mediation related to a private airplane crash. *Id.* at 1139. Respondent claimed that the parties reached an oral agreement during the mediation; however, Petitioners alleged that no agreement was finalized, and refused to comply with the purported agreement. *Id.* Petitioners contended that the oral agreement was not admissible, and was considered confidential under the communication statute. *Id.* at 1139–40. The case, however, does not consider the admissibility of other materials prepared for and used during mediation nor does it provide a concrete method with which to determine whether materials will be considered mediation communications. *Id.* at 1141.

[68] *Id.*

[69] OHIO REV. CODE ANN. § 2317.023(A)(2) (Anderson 2001).

[70] WYO. STAT. ANN. § 1-43-102 (Michie 2003).

[71] *See* OHIO REV. CODE ANN. § 2317.023; *see also* WYO. STAT. ANN. § 1-43-102.

are left with a substantial degree of uncertainty because of the overly broad and vague definition of mediation communications. Moreover, there is little judicial precedent to assist them in determining whether these materials would be considered confidential. Parties in these states should be skeptical about submitting any materials in the course of mediation that they would not want to be made public.

Pennsylvania's mediation privilege is much more comprehensive and complete in its protection of materials prepared for mediation than those of other states. Pennsylvania provides for mediating parties by establishing a privilege for both mediation communications and mediation documents,[72] as well as providing a clear definition of both.[73] The statute indicates that confidential communication can occur between parties during a mediation session,[74] and extends the privilege to communications made to the mediator even if they occur outside of the formal session.[75] It further indicates that written materials prepared for the purpose of mediation are confidential.[76] The Pennsylvania statute provides substantial direction to courts as to what materials are confidential, and leaves parties with higher certainty as to whether they will be protected by the privilege. Statutes such as the one

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[72] 42 PA. CONS. STAT. § 5949(a) (2003). "[A]ll mediation communications and mediation documents are privileged. Disclosure of mediation communications may not be required or compelled through discovery or any other process . . . ." *Id.*

[73] 42 PA. CONS. STAT. § 5949(c) (defining mediation communication as "verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program"). A mediation document consists of "[w]ritten material, including copies, prepared for the purpose of, in the course of or pursuant to mediation." *Id.*

[74] *Id.*

[75] *Id.* The District Court for the Western District of Pennsylvania, consistent with this statute, held that the mediation privilege does not extend to materials created and exchanged between parties after the mediation occurred. United States Fid. & Guar. Co. v. Dick Corp./Barton Malow, 215 F.R.D. 503, 507 (W.D. Pa. 2003). Parties in this case attempted to mediate their dispute, however, the mediation session did not yield an agreement. *Id.* at 505. After the session, they continued to informally discuss a settlement, which eventually led to an agreement. *Id.* In later civil actions, a third party attempted to discover the settlement documents, however, the parties contended that the agreement was a privileged mediation communication. While the parties' expectations may not have been protected, the court came to an appropriate ruling according to Pennsylvania's statue, thus solidifying the state's law and eliminating a degree of uncertainty as to which materials the privilege applies.

[76] 42 PA. CONS. STAT. § 5949(c).

adopted by Pennsylvania eliminate a great deal of uncertainty and encourage parties to use mediation as a forum of free exchange and open communication.

One variable on which virtually all states agree is that materials prepared for mediation that would be otherwise discoverable and evidence that is not prepared solely for the purpose of mediation are not privileged.[77] This position has also been upheld by a number of courts.[78] It is an important exception to mediation confidentiality that should be preserved in order to protect the policy in favor of a mediation privilege without impeding justice.[79] This, however, is the only significant uniformity among state treatment of mediation communications and materials prepared for mediation. Coupled with the uncertainty created by many statutes and judicial interpretation of those statutes, the discrepancies among states creates an atmosphere of suspicion, and wise parties would be hesitant to prepare mediation briefs, reports, and other materials that might later be used against them.

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[77] *See* CAL. EVID. CODE § 1120(a) (Deering 2003) ("Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation."); COLO. REV. STAT. § 13-22-307(4) (2003) ("Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a mediation service proceeding or dispute resolution proceeding."); OHIO REV. CODE ANN. § 2317.023 (D) (Anderson 2001) ("This section does not prevent or inhibit the disclosure, discovery, or admission into evidence of a statement, document, or other matter that . . . prior to its use in a mediation proceeding, was subject to discovery or admission . . . ."); OR. REV. STAT. § 36.220(3) (2003) ("Statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in mediation, are not confidential."); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(c) (Vernon 2004) ("An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.").

[78] *See generally* Bidwell v. Bidwell, 21 P.3d 161, 165 (Or. Ct. App. 2001) (noting that materials not prepared solely for the purpose of the mediation were not protected as mediation communications).

[79] Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998) (discussing the considerations of justice that are inherent in determining whether mediation should be privileged); *see also In re* Anonymous, 283 F.3d 627, 634 (4th Cir. 2002) (noting that the due process rights of a party seeking disclosure must be balanced with the burden imposed on the party maintaining confidentiality in order to determine whether a privilege should apply).

2. *The Lack of Statutory and Judicial Protection Afforded to Evidence Submitted During Mediation*

The use of evidence in the mediation process is an important means through which parties can inform both the opposing party and the mediator about the strengths of their case, and through which they can advocate for an acceptable settlement.[80] Evidence can also be used in mediation to provide a standard of legitimacy to a party's claims, and as an objective standard from which to measure a fair agreement.[81] The current structure of the mediation privilege, however, virtually ignores the need for parties and mediators to have access to relevant evidence throughout the mediation process. While most privileges are merely unclear as to whether written materials prepared for mediation should be confidential, most state privileges are silent on the issue of evidence used in the course of mediation.

Certain evidence that is used in mediation and illustrates a party's evaluation of her case or reveals attorney thought processes should be protected as confidential despite many states' refusal to protect such materials.[82] Additionally, because mediation is not subject to the same evidentiary rules as trials, evidence that may not be admissible in trial, such as hearsay,[83] and materials that would be extremely prejudicial[84] or otherwise objectionable are available during mediation.[85] Such evidence should be privileged to the extent that it would not be subject to discovery apart from the mediation.[86]

In considering the privileged nature of evidence used in mediation, California courts have refused to protect evidence that did not reveal a

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[80] Hansen, *supra* note 14, at 57 (noting the importance of acting as an advocate in mediation proceedings).

[81] Michael W. Hawkins, *Putting the Pieces Together: How to Effectively Mediate Disputes*, OHIO LAWYER, Mar./Apr. 2002, at 10, 13.

[82] 42 PA. CONS. STAT. § 5949 (c) (2003).

[83] *See* FED. R. EVID. 801.

[84] *See id.* R. 403.

[85] Hansen, *supra* note 14, at 57.

[86] *See* FED. R. CIV. P. 26(b)(1) (stating that evidence that is not admissible at trial is only discoverable if it is reasonably calculated to lead to the discovery of admissible evidence). If parties choose to use evidence that is not discoverable under Rule 26 in order to expedite the mediation process, they should not be penalized. Examples of such evidence includes that which is otherwise privileged, opinions of non-testifying witnesses, and materials prepared in contemplation of litigation. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS 791–875 (8th ed. 2001).

party's thought process.[87] The California Court of Appeals considered this question in *Rojas v. Los Angeles County Superior Court*, 102 Cal. App. 4th 1062 (Cal. Ct. App. 2002).[88] Raw evidence, such as photographs, were not deemed confidential and were subject to discovery.[89] The court concluded that the governing law did not protect substantive evidence used in a mediation proceeding,[90] except to the extent that the evidence could not be separated from a showing of the party or attorney's thought processes.[91]

The lack of attention paid by legislatures and courts to the confidentiality of evidence used in mediation, coupled with the negative decision in *Rojas*, is likely to create a hostility toward using relevant evidence during the mediation process. Legislatures and courts, however, should consider the important role that evidence can play in mediation, and materials that are not already subject to discovery and those that reveal a party's thoughts or evaluates its case should not be made public simply because of its use in mediation.

B. *The Federal Approach to Mediation Privilege*

Federal law adds to the confusion that surrounds mediation confidentiality and the confidentiality of materials prepared for mediation. The Dispute Resolution Act, 28 U.S.C. § 652(d), provides:

> Until such time as rules are adopted under chapter 131 of this title [28 U.S.C. §§ 2071 et seq.] providing for the confidentiality of alternative dispute resolution processes under this chapter [28 U.S.C. §§ 651 et seq.], each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes

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[87] Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1067 (Cal. Ct. App. 2002). The tenants of an apartment complex filed an action against the owners and builders of the complex, alleging a conspiracy to conceal building defects and infestations that were allegedly responsible for health problems in the plaintiffs. *Id.* Plaintiffs attempted to compel production of photos and evidence used in a previous mediation between the defendants, however, the defendants contended that the evidence was not discoverable under California law. *Id.*

[88] *Id.* at 1079.

[89] *Id.*

[90] *Id.*

[91] *Id.*

> and to prohibit disclosure of confidential dispute resolution communications.[92]

This statute illustrates that protecting the confidentiality of mediations is a legitimate concern of the federal government. The Act does not, however, create a federal mediation privilege.[93] Nor does it provide a uniform federal approach for the confidential treatment of materials used in mediation.

Federal courts have been divided as to whether to adopt any mediation privilege.[94] Furthermore, those district courts that have developed confidentiality rules have created widely varied approaches to confidentiality in the federal courts.[95] The dramatically different approaches taken by federal courts when dealing with the mediation privilege add to the confusion surrounding confidentiality of evidence and other materials prepared for and used in mediation. In order to eliminate this confusion and make mediation the beneficial dispute resolution tool that it is purported to be, the federal government must adopt a uniform privilege, either through statute or

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[92] The American Dispute Resolution Act, 28 U.S.C. § 652 (2003).

[93] Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, 1168–69 (C.D. Cal. 1998) (citing Federal Rule of Evidence 501, governing the adoption of a federal common law privilege).

[94] *See* RDM Sports Group, Inc. v. Equitex, 277 B.R. 415, 431 (Bankr. N.D. Ga. 2002) (adopting a federal mediation privilege, and determining that materials used as evidence in a mediation fall within the scope of that privilege); Sheldone v. Pennsylvania Tpk. Comm'n, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000) (endorsing a federal privilege that covers "all written and oral communications made in connection with or during" a mediation conducted before a "neutral mediator"); *Folb*, 16 F. Supp. 2d at 1179–80 (recognizing a federal mediation privilege governed by Federal Rule of Evidence 501 but refusing to extend the privilege to written communications that took place after the mediation or to a settlement agreement that was reached after the conclusion of the mediation proceeding); Smith v. Smith, 154 F.R.D. 661, 671 (N.D. Tex. 1994) (refusing to acknowledge a federal mediation privilege without carefully balancing the interests in favor and opposed to confidentiality; instead, applying state law to quash a subpoena for mediator's testimony).

[95] *See, e.g.*, 4TH CIR. R. 33 (stating: "All statements, documents and discussions in [mediation] proceedings shall be kept confidential"). The court applied this rule in *In re* Anonymous, 283 F.3d 627, 635 (4th Cir. 2002) (holding that settlement conversations conducted after the formal mediation proceeding had concluded were confidential because the rule did not specifically define the duration of the mediation). *See also* Doe v. Nebraska, 971 F. Supp. 2d 1305, 1307 (Neb. 1997) (applying the district court rule rather than state law in holding statements made in a mediation were admissible for the purpose of determining attorney fees and sanctions).

common law, and the scope of that privilege must extend to evaluative evidence and other advocatory materials used in mediation.[96]

IV. A UNIFORM TREATMENT OF MATERIALS PREPARED FOR MEDIATION

The current treatment of materials prepared for mediation among states and the jurisdictions of the federal government leads to a number of uncertainties for the mediating parties.[97] This is true as to both written materials and those with evidentiary uses.[98] A lack of uniformity with regards to the confidentiality of materials prepared for mediation can do nothing but hinder the use and effectiveness of mediation as a dispute resolution tool and as an option to eliminate substantial burdens on judicial resources.[99]

Mediation encourages individuals to cooperate and communicate in order to reach a mutually beneficial resolution.[100] Confidentiality provides individuals involved in mediation a sense of security.[101] The sheer number of mediation confidentiality statutes and judicial decisions illustrate the importance of protecting the legitimate intentions of parties participating in the mediation process.[102] These statutes, however, are not sufficient to protect their interests in keeping the materials used in mediation confidential. Confidentiality protections will not be adequate until there is a uniform and codified confidentiality provision governing the treatment of both written

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[96] *See RDM Sports Group*, 277 B.R. at 431. The mediation privilege and scope adopted by the United States Bankruptcy Court for the Northern District of Georgia is an appropriate standard for a uniform federal privilege. *Id.* The court held mediation briefs, illustrative slides, and letters confidential pursuant to its newly adopted privilege. *Id.* at 431–32.

[97] *See infra* Part III.A.

[98] *See* Fields-D'Arpino v. Rest. Assoc., Inc., 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) (noting that "[s]uccessful mediation . . . depends upon the perceptions and existence of mutual fairness throughout the mediation process. In this regard, courts have implicitly recognized that maintaining expectations of confidentiality is critical.").

[99] *See generally* UMA, *supra* note 4, at Purpose Clause 3 (acknowledging that a primary purpose of the UMA is to simplify existing law and to develop a uniform law governing mediations). "Currently, legal rules affecting mediation can be found in more than 2500 statutes." *Id.*

[100] *See infra* Part II.

[101] *See Fields-D'Arpino*, 39 F. Supp. 2d at 417.

[102] *See generally* UMA, *supra* note 4, at Purpose Clause 3 ("Virtually all States have adopted some form of privilege, reflecting a strong public policy favoring confidentiality in mediation. However, this policy is effected through more than 250 different state statutes.").

communications and evaluative evidentiary materials prepared for and used during mediation.[103]

A. *The Uniform Mediation Act*

A joint collaboration between the American Bar Association Section on Dispute Resolution and the National Conference of Commissioners on Uniform State Laws (NCCUSL), the UMA was recently released to state legislatures for consideration.[104] Experts in ADR and mediation developed the UMA as a vehicle through which to promote mediation and to further "prompt, economical, and amicable [dispute] resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of law."[105] The drafters acknowledged that "the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated."[106] Thus, confidentiality is a central component of the Act in order to increase the probability of a fair and successful mediated outcome.[107]

The drafters intended the UMA to not only promote uniformity, but also to promote candor through confidentiality.[108] Section 4(a) of the UMA states that "[a] mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence . . . ."[109] The Act continues in section 4(b) to describe the mediation privileges that apply:

> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication. (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator. (3) A

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[103] This Note is intended to apply only to mediations related to civil matters, and does not consider the treatment of evidence that may be relevant to criminal proceedings.

[104] Richard C. Reuben, *The Sound of Dust Settling: A Response to Crticisms of the UMA*, 2003 J. DISP. RESOL. 99, 100 (2003). The creation of the UMA involved "about five years of research, drafting, and vetting, and ultimately, overwhelming support by the American Bar Association (ABA), the National Conference of Commissioners on Uniform State Laws (NCCUSL), most major dispute resolution professional organizations and service providers, and many if not most leading dispute scholars." *Id.*

[105] UMA, *supra* note 4, at Purpose Clause 6.

[106] *Id.* at Prefatory Note.

[107] *Id.*

[108] *Id.*

[109] *Id.* § 4(a).

> nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.[110]

Similar to the statutes adopted by most states, the UMA does not protect materials that would otherwise be subject to discovery by virtue of their use in the mediation process.[111] This does not hinder the Act's beneficial nature or the privilege it affords. Mediation should not be a shield with which parties can preclude others from discovering evidence.[112] Additionally, so long as there is a uniform approach to mediation confidentiality that protects the legitimate expectations of parties involved in the proceedings, the public policy encouraging confidentiality is met.[113]

The UMA defines mediation communication as "a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[114] The Commentary to the UMA indicates that statements or conduct intended to be assertions are covered by the Act.[115] This also applies to any written materials related to the mediation that are created or submitted before and during the course of mediation.[116] However, it does not protect materials that are used after the mediation has concluded.[117] The drafting committee decided to leave courts to decide when a mediation officially ends, pursuant to the facts and circumstances of individual cases.[118]

Enunciating the specific materials covered by the mediation privilege adds a substantial degree of uniformity to a sea of otherwise vague

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[110] *Id.* § 4(b).

[111] *Id.* § 4(c).

[112] *See* Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1071 (Cal. Ct. App. 2002) ("[M]ediation and litigation privilege were not meant as a device or subterfuge to block evidence.").

[113] Deason, *supra* note 9, at 82 (noting that, in many instances, confidentiality is not just an element that enhances communication in mediations, it is "a precondition for any discussion") So long as the privilege provides parties with an opportunity to predict the degree of confidentiality in their mediation and protects their legitimate expectations of privacy, it meets these goals. Privileges held by parties allow them to control the conditions under which they communicate with the opposing side. *Id.* at 84.

[114] UMA, *supra* note 4, § 2(2).

[115] *Id.* § 2.2, Comment 2.

[116] *Id.*

[117] *Id.*

[118] *Id.*

confidentiality statutes. The UMA should be adopted by state legislatures because of the substantial progress it makes toward a uniform mediation privilege for written materials submitted before or during a mediation. However, without specifically determining when mediation ends, there is still a substantial deference given to courts in determining whether materials are privileged. In adopting the UMA, states should consider this shortcoming and make provisions in their own statutes governing the timeframe of a mediation.

The UMA's Commentary also attempts to clarify what evidentiary materials are classified as mediation communications.[119] It provides that briefs and reports prepared by the parties for the mediation should be considered confidential.[120] Materials used in the mediation that were not created specifically for the mediation, however, are not protected.[121] The Commentary further explained that materials prepared for mediation that reveal positions taken by parties are confidential mediation communications, and that documents prepared by expert witnesses participating in the mediation are also included in this definition.[122] There is, however, a significant amount of evaluative evidence that could be submitted in the course of a mediation that is not covered by either the UMA or its commentary.[123] The efforts made by the UMA in governing confidentiality of materials prepared for mediation and creating a complete definition of mediation communication are a drastic improvement over the various state statutes governing this area. It does not, however, do enough with regards to other evidence used in mediations.

The UMA acknowledges that the free flow of information essential to a successful mediation can be achieved only if the participants are provided a guarantee that what they disclose will not be used to their detriment in later court proceedings.[124] This is as true for the materials created and submitted

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[119] *Id.*

[120] *Id.*

[121] *Id.* (noting for example that "a tax return brought to a divorce mediation would not be a 'mediation communication' because it was not a 'statement made as part of the mediation,' even though it may have been used extensively in the mediation. However, a note written on the tax return to clarify a point for other participants would be a mediation communication.").

[122] *Id.*

[123] Photographs and other evidentiary materials not expressly made confidential in the commentary to the UMA would be subject to varying interpretations as to whether they were created solely for the mediation, whether they were used as an assertion, and whether they can be considered confidential under the Act.

[124] UMA, *supra* note 4, at Prefatory Note.

throughout the mediation process as it is for the actual communication that occurs during the mediation.

Simply providing a privilege that protects mediation communications and materials prepared for mediation is not enough. The guarantee of confidentiality must be uniform in order to provide parties the true protections needed to foster open communications and achieve all of the benefits mediation has to offer.[125] "Uniformity of the law helps bring order and understanding across state lines . . . uniformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one State may be sought in litigation or other legal processes in another State."[126]

The UMA improves the uniformity and clarity of the mediation privilege.[127] Sections 4–6 of the UMA should be adopted and fully implemented by state legislatures and the federal government.[128] While the UMA creates a uniform statutory approach to protecting the confidentiality of certain materials prepared for or submitted during the course of mediation, there is not an adequate test for evidentiary materials to be used by the judiciary in determining whether certain materials should be treated as confidential. Such a test is essential to eradicate the remaining uncertainty left after the adoption of the UMA, or in lieu of the adoption of the UMA, should legislatures refuse to codify the Act as law.

B. *Factors To Consider When Determining The Admissibility of Evaluative Evidence Used In Mediation*

To determine the confidentiality of materials not protected by the UMA, courts should apply a uniform test. This test will enhance the parties' ability to predict the future treatment of evidence used in a current mediation, and would thus benefit the entire mediation process. Any test applied by courts to determine the confidentiality of materials used in mediation should include the following factors: (1) whether the materials were created specifically for use in mediation; (2) if they have an independent significance apart from the mediation; (3) whether the materials were prepared as a tool of advocacy; (4)

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[125] Deason, *supra* note 9, at 84 ("In mediation, as in other settings in which privileges encourage communications, protection for those communications must be predictable if confidentiality is to have its intended effect.").

[126] *See* UMA, *supra* note 4, at Prefatory Note.

[127] *See id.* §§ 4–6.

[128] *Id.*

the timeline in which the materials were created and submitted; and (5) if they were prepared and submitted with a legitimate expectation of privacy.

The first question that a court should ask in order to determine the confidentiality of these evidentiary materials is whether they were specifically created for use in the mediation.[129] Mediation should not provide a confidentiality shield to otherwise admissible evidence.[130] It cannot be a tool for those who simply want to protect themselves from discovery.[131] "[Individuals cannot] just put a piece of evidence in a mediation and make it disappear."[132] Materials not created solely for the mediation, but those that happen to be utilized in the course of mediation should not be privileged against use in later proceedings.[133] On the other hand, advocatory or evaluative materials prepared and utilized in the course of mediation in a legitimate effort to further the mediation process should be protected as confidential.[134] If there is a question regarding the discoverability of materials, courts should conduct an *in camera* review of the relevant materials to determine whether they should be confidential.[135]

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[129] *See infra* Part III.A.

[130] *See* Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1071 (Cal. Ct. App. 2002) (stating that "[m]ost lawsuits are *factual* disputes, rather than legal ones, which is the reason discovery is often . . . difficult . . . [t]o give the parties one more avenue where they could hide evidence and obstruct the fact finding process of litigation would be, in our view, disastrous and would not foster resolution of disputes but would hinder them. Parties could simply agree to mediate, introduce all their evidence, and then refuse to settle, and claim privilege.").

[131] *See id.* at 1078.

[132] *See id.* at 1071.

[133] *See infra* Part III.A (noting that virtually every state's confidentiality statute provides an exception for materials that would be otherwise discoverable but for their use in the mediation).

[134] *See generally Rojas*, 102 Cal. App. 4th at 1079 (granting privilege for materials that were prepared for the mediation and could not be separated from the raw evidence).

[135] *See* Van Horn v. Van Horn, 2003 WL 21802273, at *4 (Cal. Ct. App. Aug. 6, 2003) (ordering an in camera review of the materials in dispute). *But see* Eisendrath v. Superior Court of Los Angeles County, 109 Cal. App. 4th 351, 365–66 (Cal. Ct. App. 2003) (holding that the trial court erred when it permitted an in camera review of mediator testimony). An in camera review would be beneficial in this instance, because although it would disclose the contents of the materials prepared for mediation to the judge, it could prevent the disclosure of damaging information to the public.

A second concern that must be taken into consideration is whether the materials have an independent significance apart from the mediation.[136] If the proposed evidence or the subject of discovery has a relevance apart from the mediation, it cannot be subject to a confidentiality restriction simply because it was used during the course of mediation.[137] Mediation should not create unfair obstructions to opposing parties. It should be used as a tool that encourages settlement, not one that frustrates discovery or hinders future litigation efforts. If, however, there is no relevance to the materials apart from their use in mediation, or apart from the information they were designed to convey in the mediation process, they should be privileged.[138] Protecting materials with no independent significance would not impose an unreasonable burden on other parties.[139] Because of the essential nature of a uniform mediation privilege, if courts are uncertain as to whether materials were prepared specifically for a mediation, the burden should be on the party seeking disclosure of the evidence.[140]

The timeline in which the materials were created and exchanged is the third factor to be considered by courts in determining whether or not they should be privileged.[141] If the materials are created and submitted prior to or during the mediation, they should be protected as confidential.[142] Those exchanged after the mediation has concluded, or those with a timeline that is difficult to ascertain, should be subject to a stricter evaluation before applying the privilege.[143] If the materials were submitted close in time to the

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[136] *See generally* Bidwell v. Bidwell, 21 P.3d 161, 164 (Or. Ct. App. 2001) (noting that the materials that were privileged had no independent significance apart from the mediation, and therefore should be protected from discovery).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] As a matter of policy, in order to protect the open communication and free flow of information, there should be a presumption of confidentiality. If it can be shown that materials would have been used regardless of the confidentiality, then evidence should be discoverable.

[141] *See, e.g.*, *Bidwell*, 21 P.3d at 164 (privileging letters that were sent closely following a mediation because the timeline in which they were sent indicates their purpose as a mediation communication).

[142] *Id.*

[143] Materials created and distributed a substantial length after the mediation concludes should be deemed negotiation settlement documents and as such are covered by Federal Rule of Evidence 408. The significant difference in classification is that settlement communications are discoverable, but not admissible, whereas those covered by mediation confidentiality are not subject to admissibility or discovery. *Id.*

mediation and were designed or used to further the mediation or the agreement reached at mediation, they may be subject to a confidentiality privilege in the interest of justice.[144] If they served no purpose relevant to the mediation, or were submitted a significant amount of time after the mediator had closed the proceedings, the materials should not be protected, and should be subject to discovery.[145] While conducting its evaluation, the court should note the length of the mediation, the number of mediated sessions, and the likelihood that parties could reasonably have inferred that they were still participating in the mediation process.[146]

Were the materials prepared for mediation as a tool of advocacy? This is another question that should be asked when determining whether a confidentiality privilege applies.[147] If the materials are prepared and used as a tool of advocacy, and they cannot be separated from this purpose, then they should not be discoverable.[148] Materials created for mediation that show thought processes, break down a party's case, or are designed to help advocate for one party have a purpose that is specifically tied the mediation.[149] They should be protected as confidential.[150] If the materials are not tools of advocacy, they are more likely to be simply illustrative materials or other evidence not significant to the mediation. Thus, they should not be protected.[151] The court in *Rojas* employed this reasoning when it specifically separated those materials that were raw evidence from those that were derivative or illustrative of a party's evaluation of its own case.[152]

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[144] If mediation has obviously concluded and parties are made aware that confidentiality no longer applies, materials and evidence provided after its conclusion should not be privileged. *See, e.g.*, Regents of the University of California v. Sumner, 42 Cal. App. 4th 1209, 1213 (Cal. Ct. App. 1996) (deciding that a transcript of an oral agreement created after the conclusion of the mediation was admissible). This approach has since been codified in CAL. EVID. CODE § 1119 (West Supp. 2004).

[145] *See generally Bidwell*, 21 P.3d at 164.

[146] *Id.*

[147] *See* Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1079 (Cal. Ct. App. 2002).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* ("[N]on-derivative material, such as raw test data, photographs, and witness statements, are not protected . . . [t]o the extent any of the materials sought are part of a 'compilation' prepared for the mediation or put together in such a manner that it discloses the attorneys' or parties' evaluations of the strengths and weaknesses of the case or

The final criteria in determining the confidentiality of materials prepared for mediation, whether the materials were prepared and submitted with a legitimate expectation of privacy,[153] is slightly more subjective than the other criteria but no less important. If parties participating in the mediation and submitting their materials did not expect them remain private, then the public policy rationale for the privilege does not apply.[154] If it can be shown that parties are hiding behind a screen of confidentiality, but they would have presented the materials despite their discoverability at a later date, then confidentiality protection diminishes.[155] If, however, participants would not have disclosed the materials but for the assurances or legitimate belief that they would remain confidential, then they should be evaluated according to the other criteria of this test to determine if the privilege should apply.[156]

C. *Categorical v. Qualified Privilege*

There is a possibility of injustice whenever a privilege is recognized.[157] Any uniform approach to ensuring the confidentiality of materials and evidence created for and used during mediation might be criticized for failing to provide for circumstances where justice demands the disclosure of confidential materials.[158] This is an important consideration for any dispute resolution system. Whether mediation privileges should be categorical or qualified has been the subject of debate by legislatures, courts, and legal scholars.[159] Qualified privileges allow courts to weigh the need for disclosure

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discloses their negotiation posture, if it can be reasonably detached from the compilation, it must be produced.").

[153] *See, e.g., id.* at 1070. The party seeking the privilege argued that, but for assurances of confidentiality, the evidence would not have been produced at the mediation. *Id.* The court accepted this argument when privileging derivative materials, but rejected it as applied to raw evidence. *Id.* at 1071.

[154] *See id.* at 1071.

[155] *See id.*

[156] *See id.*

[157] STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 438 (4th ed. 2003).

[158] *See Rojas*, 102 Cal. App. 4th at 1079. The court did not privilege raw evidence because the individuals attempting to discover the evidence had no other means of obtaining the information, and preventing them from using it would have caused a manifest injustice. *Id.*

[159] *See, e.g.*, CAL. EVID. CODE § 1119 (Deering 2003) (calling for a categorical mediation privilege); OHIO REV. CODE ANN. § 2317.023 (Anderson 2001) (providing a

versus the importance of protecting the confidential nature of a mediation.[160] While this may be a benefit in the eyes of some scholars, qualified privileges also have substantial disadvantages.[161] At the time of a dispute, parties are often unable to foresee the need for disclosure of information and evidence disclosed during the mediation in future litigation.[162] Parties would be unable to predict with any degree of certainty whether the materials used in mediation would indeed remain confidential.[163]

A categorical privilege, on the other hand, would ensure parties the ability to predict whether evidence used in a mediation would be subject to future discovery and admissibility at trial.[164] However, it may do so at the expense of justice.[165] Accordingly, the test encouraged by this Note should be accompanied by a limited qualification allowing only the discovery of evidence used in mediation that is unavailable through any other means and when the exclusion of such evidence would result in a manifest injustice.

If there were no other measures through which the opposing party could gather the evidence, then it would be unjust to hinder their access to it.[166] In

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qualified privilege); *see also* UMA, *supra* note 4, § 6(b) (applying a very limited balancing test in two exceptions to the UMA's mediation privilege). The UMA provides:

> There is no privilege . . . if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality and that the mediation communication is sought or offered in: (1) a court proceeding involving a felony [or misdemeanor]; or (2) [a] proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of mediation.

Id. In applying a qualified privilege, Magistrate Judge Wayne D. Brazil ignored the absolute nature of California's privilege and weighed the need for the privilege against the possibility that preventing disclosure of mediation communications would lead to an unjust resolution of pending litigation. *See* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1131 (N.D. Cal. 1999).

160 GOLDBERG ET AL., *supra* note 157, at 444.

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *See, e.g.*, Rojas v. Los Angeles County Superior Court, 102 Cal. App. 4th 1062, 1075 (Cal. Ct. App. 2002). Parties to the mediation had compiled binders with photos and other evidence of the defects. *Id.* at 1066–71. After the creation of the binders, repairs were conducted in the apartments, destroying the evidence. *Id.* There were no other means through which the residents of the apartment complex could gather evidence of the

this situation, courts should conduct case-by-case analyses of whether the privilege should apply. If justice can only be satisfied by a disclosure of the materials and their admissibility in future matters, they should not be confidential.[167] However, this should be used only when there are no other measures through which parties can access the information, not as a matter of convenience. A qualified privilege leaves a substantial leeway for courts to determine, pursuant to the facts of the case, whether the privilege should apply. If used incorrectly, the qualified exception could lead to a slippery slope eliminating the benefits of the privilege.[168] Accordingly, it should be used on a very limited basis and must not be the sole determining factor in either allowing or excluding materials prepared for mediation.

V. CONCLUSION

The promise of confidentiality for participants in mediation is essential to protect their legitimate expectations and to encourage use of ADR.[169] Without confidentiality provisions, there would be fewer parties willing to participate in mediation,[170] and those who did participate would be hesitant to disclose any information that could be used to their disadvantage in future proceedings.[171] Numerous statutes, both state[172] and federal,[173] as well as the

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poor construction and microbes that they alleged caused their illnesses. *Id.* The court held that the interests of justice demanded a finding that the raw evidence was not work product or derivative of work product and was not privileged. *Id.* at 1075.

[167] *Id.* at 1075.

[168] *See, e.g.*, *Olam*, 68 F. Supp. 2d at 1131. The court read a qualified approach into a categorical statutory privilege. If courts are predisposed to using justice as a factor in determining whether mediation should be privileged, allowing such an exception to the privilege may provide courts looking for an opportunity to admit otherwise protected materials an excuse to do just that.

[169] *See generally* Kentra, *supra* note 1, at 722 (declaring that "[c]onfidentiality lies at the heart of the mediation process"); *see also generally* Deason, *supra* note 9, at 80 (stating that confidentiality is integral to a successful mediation).

[170] *See generally* Kentra, *supra* note 1, at 722 (acknowledging that confidentiality often induces parties to choose mediation over litigation because of their desire to stay out of the public eye); *see also generally* Deason, *supra* note 9, at 82 (indicating that in many mediations confidentiality is not only a measure with which to enhance participation, it is also a prerequisite to participation).

[171] *See generally* Kentra, *supra* note 1, at 722 ("Parties would be hesitant to bare their souls to someone who may be called as a witness against them in subsequent litigation."); *see also generally* Deason, *supra* note 9, at 81 (noting that, "[i]f a lawsuit is a possibility, or especially if one is already underway, much that might be said in a good

UMA,[174] address these issues and recognize the importance of the confidentiality to the success of mediation proceedings. However, they have not done enough. There is a lack of uniformity among confidentiality provisions. This is particularly true in light of the relatively sparse consideration given to confidentiality of evaluative evidence and other materials prepared for and used in the course of mediation.[175] Any contemplation of the confidentiality of these materials has been inconsistent and lacks the uniformity necessary to ensure the benefits of mediation are met.

In order to truly protect mediation participants, states should first adopt the UMA, and supplement it with a uniform test to be utilized by courts when determining whether evidence and materials used to advocate one's position in mediation should be privileged.[176] Using this suggested analysis increases the protection of the legitimate expectations of parties, prevents the use of mediation as a tool from which to exclude evidence from discovery and trial, and ensures the treatment of such materials by the most appropriate and just means.[177]

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faith attempt to reach settlement during a mediation could become an admission against interest in the courtroom in the absence of confidentiality protections").

[172] *See infra* Part III.A.

[173] *See infra* Part III.C.

[174] UMA, *supra* note 4, § 4–6.

[175] *See infra* Part III.B.

[176] *See infra* Part IV.

[177] *See* Fields-D'Arpino v. Rest. Assoc., Inc., 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999).